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Report on Municipal Measure No. 52: Requires Vacancies in City Offices to be Filled by Election

City Club of Portland (Portland, Or.)

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REPORT ON
MUNICIPAL MEASURE NO. 52
REQUIRES VACANCIES IN CITY OFFICES
TO BE FILLED BY ELECTION

Purpose: "Amends Section 2-206 of the City Charter to provide that a vacancy or declared future vacancy in the office of Mayor, City Commissioner or City Auditor shall be filled by a special election, or elections, in certain situations. Authorizes appointment of an interim City Auditor pending election."

To the Board of Governors,
The City Club of Portland:

I. INTRODUCTION

Measure No. 52 is a proposed amendment to the Charter of the City of Portland which would replace the existing method of filling vacancies in the office of mayor, city commissioner or city auditor. Under the present City Charter provision, vacancies are filled by appointments as determined by the City Council. The proposed amendment would require that vacancies in these city offices be filled by a special election or elections. The full text of the proposed amendment is included in this report as Appendix A.

II. SCOPE OF RESEARCH AND BIBLIOGRAPHY

Resource persons interviewed by members of the Committee are listed in Appendix B of this report. The interviews included persons directly and indirectly associated with city government, persons associated with other local and regional governments, as well as others who are observers of the processes of city government.

III. HISTORY AND BACKGROUND

The question of appointments versus elections as a procedure to fill the vacancies in the mayor's office and on the City Council has been the subject of discussion by the City Council for several years. In 1974, according to Commissioner Mildred Schwab, a study was prepared for the City Council evaluating two alternative proposals for replacing vacancies on the Council and in the mayor's office. The first proposal was similar to the current proposed amendment. The second proposal would have continued the appointment process, but would have incorporated a more defined screening process for candidates. Under the second proposal, a standing committee appointed by the Council would be established whose function would be to recommend five names to the Council for consideration to fill vacancies.

The subject of appointments versus elections was not seriously considered again by the Council until 1979. The discussion was triggered by the appointment of Mayor Neil Goldschmidt to the position of United States Secretary of Transportation. In the ensuing months, it was necessary for the Council to appoint a successor to the mayor's position and following that, to fill the vacancy of Commissioner McCready after her appointment as mayor. Mike Lindberg was appointed as Commissioner to fill the vacancy.

The appointment process following the Goldschmidt departure consumed much time and debate by the Council, and because of this, the 1974 study was reconsidered. The proposed amendment to the Charter, which would require election rather than appointments, was drafted by the City Attorney's office at the request of Commissioner Ivancie. The Charter amendment was submitted to the voters by Resolution No. 32554, adopted by Council on November 21, 1979. The amendment is opposed by Mayor McCready and supported by the other commissioners.

Officials elected to the position of mayor, commissioner or auditor occupy their respective offices for a four year term. The proposed amendment is intended to establish a procedure for filling a vacancy occurring at any time during the four year term by a special nominating and runoff election. As will be noted later, (See Discussion) the proposed procedure fails to accomplish its intended purpose because of a significant drafting error in the amendment.

The amendment is intended to apply to vacancies occurring during three time periods of a four year term of office:

- (1) more than 100 days before the primary in the fourth year of the term, i.e. approximately the first three years of the term.
- (2) 70 to 101 days before the primary in the fourth year of the term.
- (3) less than 70 days before the primary in the fourth year of the term.

Drafters of the amendment in the City Attorney's office intended that a vacancy occurring in the first time period, i.e. more than 100 days before the primary in the fourth year of the term of office, would trigger a mandatory special nominating election within 90 days of a vacancy unless a primary were scheduled within 100 days. If no candidate obtained a clear majority in the nominating election, a runoff election would be held within 45 days of the first election between the two candidates receiving the highest number of votes in the first election.

If a vacancy occurs in the second time period, i.e. 70 to 101 days before the primary in the fourth year, the primary would be used as a nominating election followed by a runoff election within 45 days to fill the unexpired term. If a vacancy occurs in the third time period, i.e. less than 71 days prior to the May primary in the fourth year of the term, a special procedure would be utilized dependent on whether the incumbent vacating the office was running opposed, running unopposed, or not running in the May primary.

A specific provision applicable to vacancies in the city auditor's office has been incorporated into the proposed amendment to permit the Council to appoint a city auditor on an interim basis. Under the existing City Charter, unless the office of city auditor is occupied, no person from that office is authorized to sign for payroll payments, payments due, contract payments, etc. Such a restraint on city business pending a special election would pose a tremendous burden and thus the Council added a specific provision which would authorize the appointment of an interim city auditor.

IV. ARGUMENTS IN FAVOR OF THE MEASURE

1. Positions such as commissioner and mayor have too great an impact on residents of the city to exclude voters from the decision making process.

2. The election process encourages participation of voters and encourages accountability to the electorate.

3. Appointed incumbents almost invariably are successful when running for reelection, and thus have an unfair advantage over other potential candidates. This tends to create a City Council comprised of commissioners who are initially appointed and perpetuates "in house" politics. The present system tends to disenfranchise the voters.

4. The present system of appointments is a haphazard process which has no defined rules or guidelines, and which provides for no specific mechanism to incorporate community input:

(a) It encourages a choice based upon the likes and dislikes of the remaining four Council members rather than the community.

(b) It encourages "wheeling and dealing" and compromise on behalf of the new Council member or mayor.

(c) It encourages intensive lobbying of Council members by special interest groups.

(d) It penalizes the potential appointee who has taken contrary political views to those on the Council, or who is viewed as a political threat to those on the Council.

5. Until elected, an appointed commissioner is not as effective because he or she is treated as a second class commissioner by the other Council members.
6. The appointment process takes up a considerable amount of Council time that could otherwise be used for City business if the vacancy were filled by election.
7. The election process will produce more qualified persons to fill vacancies.

V. ARGUMENTS AGAINST THE MEASURE

1. A significant legal drafting error in the language of the proposed amendment renders the proposed procedure totally unworkable for any vacancy occurring more than 100 days before the May primary in the fourth year of the term of office.
2. The appointment system has worked well in the past in choosing new officials.
3. The Council is capable of making a speedier decision on filling the vacancy than the proposed election process. Under the proposed amendment, a special election and special runoff election could take over four months to fill a vacancy.
4. A pending election concerning a citywide office has an inevitable effect of slowing down business at City Hall until such time that it is resolved. The proposed amendment would slow down City business.
5. The proposed special election procedure favors candidates with name familiarity and large sums of campaign financing available on short notice.
6. Special elections historically have low voter turnout.
7. The appointment process encourages the participation of highly qualified candidates who would not ordinarily enter the election process and thus produces a more qualified person for office.
8. In the event that two vacancies occur simultaneously on the City Council, the Council would not have the required votes to utilize the emergency clause of the City Charter which expedites the effective date of Council actions and which is used by the Council in conducting approximately 60 percent of its business.
9. Requiring a special election to fill vacancies is costly. Since the cost of a special election within the City of Portland is now approximately \$80,000, and since the proposed amendment provides for a runoff election, the potential bill for filling a vacancy is \$160,000.

VI. DISCUSSION

A. Philosophical Considerations.

Under the existing City Charter, vacancies in the offices of mayor, commissioner and auditor are filled by appointment of the City Council. Although your Committee heard criticism directed at the appointment process itself, most witnesses have been impressed with the quality of the appointees over the past several years.

Several witnesses favored the existing system on the basis that it results in more qualified officials. Many qualified individuals who would never consider running in an election for reasons such as lack of money or name familiarity are willing to participate in the appointment process. Whether the appointment or election process results in a more qualified official, however, is a debatable and subjective question. Who is more qualified: Neil Goldschmidt, Frank Ivancie—initially elected, or Connie McCready, Mildred Schwab, Charles Jordan, Mike Lindberg—initially appointed? When the question was asked of one commissioner, the response was: "What is qualified? And who is to say?"¹

¹ The standard charter model followed by the League of Oregon Cities provides for filling vacancies by appointment. In actuality charters vary throughout the State. Ashland fills only by election. Eugene and Beaverton fill by appointment. Salem's provisions include an election feature, but initially fills vacancies by appointment. A counterpart Northwest metropolitan area, Seattle, fills by appointment.

Most of the criticism of the existing appointment system is leveled at the method rather than the actual appointees. Several significant concerns were stated. First, your Committee heard repeatedly that the appointment system tends to "disenfranchise" Portland voters. Historically, appointees go on to win elections and reelections because of the name familiarity advantage attached to incumbency. Incumbents virtually never lose reelection campaigns in Portland. Since most vacancies have occurred mid-term, and have been followed by appointments, it is not surprising that four out of five members of the City Council assumed office by appointment. (Ivancie assumed office by election). New members to the Council are appointed by commissioners who were themselves appointed. Your Committee agrees with witnesses who argue that this "in breeding" is unhealthy in a system whose charter provides for elective office, in a Council with so few members, and in a community where these offices have such widespread impact.

Second, your Committee was informed that the existing appointment system is a haphazard process, without defined guidelines and without any particular method for incorporating community input. Appointments have been based upon the particular likes and dislikes of Council members. The appointment process penalizes the potential appointee who has taken a contrary political position on controversial issues as well as those who are viewed as a potential threat to Council members. Oftentimes qualified candidates are weeded out of the running for the sake of compromise among Council members. Thus, the pool of potential candidates and political philosophies is necessarily more limited. In the case of a mayoral vacancy, where some obvious candidates come from within the Council, the appointee may be a candidate who represents the least competition at the next general election to other potential mayoral candidates on the Council.

The appointment process affords special interest groups a method of circumventing the election process. Your Committee was informed that Council members are subjected to intense lobbying by special interest groups during the appointment process. The process lends itself as well to "wheeling and dealing" between potential appointees and Council members seeking precommitments on certain issues in exchange for support of the appointee. Witnesses informed the Committee that this latter criticism has in practice been much more than a mere theoretical concern.

A final criticism of the existing system is the interference with City business while the Council is wrestling with the appointment. This concern manifested itself in the paralysis at City Hall in the aftermath of the departure of Mayor Neil Goldschmidt, when for a considerable time period the Council was preoccupied with choosing a mayoral successor to the exclusion of other important City business. The proposed amendment, however, would not necessarily solve this problem. The special election process could take several months, and most witnesses agreed that a pending election for mayor or council would also retard ongoing business at City Hall.

Your Committee found that the election process embodied in the ballot measure addresses the major problems of the existing system. Its principal advantages are voter participation in the initial selection and subsequent accountability of the new official to voters rather than to Council members or special interests.

The most obvious disadvantage to the proposed Charter amendment is cost. The City Auditor estimates that it would cost the City \$80,000 per special election and in the event that a special runoff election was held, a total of \$160,000. Although the cost represents a considerable expense, if viewed in the context of a City budget of \$250 million, the cost is rather insignificant.

The proposed amendment has been further criticized as favoring the potential candidate who, in a special election, has the advantage of name familiarity or large sums of money at his or her disposal. Such candidates may be further advantaged by small voter turnouts that usually occur for special elections. While your Committee agrees these criticisms have some validity, it also concludes that these criticisms may be leveled at the entire democratic election process and not merely this ballot measure.

B. Procedural Issues.

Some witnesses observed a technical flaw in the proposed amendment in the event of two simultaneous vacancies on the Council. Under the Charter, four Council votes are necessary to utilize the "emergency" clause that makes Council action take effect immediately rather than wait the statutory period of approximately five weeks. Approximately 60 percent of Council business is conducted using the emergency clause. Under the proposed amendment, in the event of two vacancies, the Council would not have use of the emergency clause for a period as long as several months.

One witness testified that City business would be crippled without use of the emergency clause. All five Council members, however, whether they were pro or con on the Measure, testified that temporary loss of the emergency clause would have an insignificant impact on City business. They indicated that the emergency clause is used with much more frequency than necessary and that in reality, with some planning, its use is necessary only a small percentage of the time. They indicated most true emergencies can be addressed by administrative action. Finally, it was noted that there have never been two simultaneous vacancies and that the likelihood of such an occurrence in the future is so remote as to negate this objection to the proposed amendment.

Offsetting persuasive philosophical arguments in favor of the election process itself, however, is a significant error in the language of the amendment which renders the amendment totally unworkable. Subsection (b) of the Amended Charter Section 2-206 is intended to trigger a special nominating and runoff election whenever a vacancy occurs more than 100 days preceding a primary. This section is intended to cover all situations in which a vacancy may occur more than 100 days before the May primary in the fourth year of the term of office, i.e. approximately the first three years of a four year term, over 75 percent of possible vacancy situations.

Section (b) authorizes a special election to fill such vacancies as follows:

"(b) If a vacancy occurs in an office elective under this charter more than 100 days preceding the regular primary election to be held in the fourth year of the term of that office, *but less than 71 days* preceding the regular general election to be held in that year, the council, by a single resolution, shall call for two special elections not more than 45 days apart."

The above provision would require a physical impossibility before a special election could be authorized. The general election always follows the primary election. It is impossible for a vacancy to occur more than 100 days before the primary *but less than 71 days* before the general. Thus in over 75 percent of the possible vacancy situations during a four year term, this amended procedure would provide no method of filling the vacancy. Your Committee is of the opinion that this error renders the proposed amendment incapable of application. Your Committee pointed out this problem to the City Attorney, who agreed that his office had made an apparent mistake in drafting the proposed amendment. The Council was unaware of this drafting error at the time it passed its resolution in favor of the proposed amendment.

The City Attorney expressed the hope that if this drafting error were construed by a court, it would be "interpreted to be applied in a workable manner." However, in the opinion of your Committee, the court system is not the proper place to resolve this problem, a problem which is obvious even prior to enactment of the amendment. Litigation in the trial and appellate courts would consume unwarranted time and cost, and would not necessarily lead to a clear resolution of the problem.

Redrafting of Section (b) to correct the error cannot be done prior to the May 20, 1980 primary. Your Committee inquired as to the possibility of withdrawing this measure from the May 20, 1980 ballot, and was informed by the offices of the Secretary of State and Multnomah County Elections that it is not possible at this time to withdraw the measure.

VII. CONCLUSION

The central philosophical question posed by this ballot measure is: by what means should we choose our City officials, appointment or elections? Your Committee is persuaded that City positions which have such significant impact on all citizens of Portland should be filled by participation of all the voters. The present system, although it has produced some very good officials, embodies some serious weaknesses that tend to perpetuate "in house" politics at the expense of full participation by the voters. On balance, the intended election procedure of the proposed charter amendment represents a sound method to return control to the voters.

Although your Committee supports the principles underlying the proposed charter amendment, it regrettably must oppose passage of this particular proposal. This measure would not accomplish what it is intended to accomplish because of a significant drafting error in the language of Section (b) of the amendment. If passed at the May 20, 1980 primary, this amendment would provide absolutely no guidance to filling vacancies in over 75 percent of situations in which a vacancy might occur. The proposed amendment should be redrafted in its entirety and submitted to the voters at the next possible election.

VIII. RECOMMENDATION

Your Committee recommends that the City Club of Portland oppose the proposed Charter Amendment and urges a *NO* vote on City Measure No. 52 at the May 20, 1980 primary election.

Respectfully submitted,
Howard B. Somers
Robert A. Stahl
Mark W. Teppola
Jerry K. Weller
Robert L. Williams
Jeffrey A. Babener, *Chairman*

Approved for publication by the Research Board on April 10, 1980 and authorized by the Board of Governors for distribution to the membership for discussion and action on Friday, April 25, 1980.

APPENDIX A**AN ACT**

"An Act to amend an Act of the Legislative Assembly of the State of Oregon entitled: 'An Act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all Acts or parts of Acts in conflict therewith,' approved by the Governor and filed in the office of the Secretary of State, January 23, 1903, as subsequently amended by said Legislative Assembly and by the people of the City of Portland from time to time, by amending Section 2-206, Vacancies in Office, Filling of Vacancies, to provide that vacancies in elective offices shall be filled by special election."

BE IT ENACTED BY THE PEOPLE OF THE CITY OF PORTLAND, OREGON

Section 1. The Act of the Legislative Assembly of the State of Oregon entitled: "An Act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith," approved by the Governor and filed in the office of the Secretary of State January 23, 1903, as subsequently amended by said Legislative Assembly and by the people of the City of Portland from time to time, hereby is amended by amending Section 2-206 to read as follows:

Section 2-206. Vacancies in Office, Filling of Vacancies. (a) A vacancy in office shall exist when the mayor, a commissioner or the auditor fails to qualify by taking the oath and filing the bond prior to January 1 of the year following his election, or when any officer or employee dies, resigns, is removed from office, is convicted of a felony, is judicially declared to be mentally ill, is judicially convicted of corruption, malfeasance or delinquency in office, forfeits his office under specific provisions of this charter, or is elected or appointed to a different office, and qualifies, takes and assumes the duties of such different office.

(b) If a vacancy occurs in an office elective under this charter more than 100 days preceding the regular primary election to be held in the fourth year of the term of that office, but less than 71 days preceding the regular general election to be held in that year, the council, by a single resolution, shall call for two special elections not more than 45 days apart. The first special election will be for the purpose of nomination. It shall be held not more than 90 days after the vacancy occurs, unless the council finds reasonable cause for delay beyond 90 days. If one candidate receives a majority of the votes cast for the office, that candidate will be deemed elected to fill the unexpired term of the office and the second special election will not be held. If no candidate receives a majority, one of the two candidates receiving the highest number of votes cast in the first special election will be elected to fill the unexpired term in the second special election.

(c) If a vacancy occurs in an office elective under this charter less than 101 days and more than 70 days preceding the regular primary election to be held in the fourth year of the term of that office, the council shall call for a special election to be held not more than 45 days following the regular primary election. The regular primary election will be for the purpose of nomination to fill the unexpired term and nomination of candidates for the next four-year term of the office to be voted upon in the regular general election. If one candidate receives a majority of the votes cast for the office, that candidate will be deemed elected to fill the unexpired term of the office and the special election will not be held. If no candidate receives a majority, one of the two candidates receiving the highest number of votes cast in the regular primary election will be elected to fill the unexpired term in the special election.

(d) If a vacancy occurs in an office elective under this charter less than 71 days preceding the regular primary election, but more than 70 days preceding the regular general election, to be held in the fourth year of the term of that office, and the incumbent vacating the office:

(1) Was one of two or more candidates for the same office in the regular primary election, then if an opposing candidate was nominated by a majority of votes cast in that primary, that candidate will be deemed elected to fill the vacated office until the regular general election and the candidate elected at the regular general election will fill the balance of the unexpired term. If no candidate opposing the incumbent was nominated by a majority of votes cast in that primary, the council shall call for a special primary election as provided in paragraph (2) of this subsection.

(2) Was an unopposed candidate for the same office in the regular primary election, then the council shall call for a special primary election. If the special primary election is held less

than 101 days preceding the regular general election and no candidate is nominated by a majority of votes cast, the candidate elected in the regular general election will fill the balance of the unexpired term. If the special primary election is held less than 101 days preceding the regular general election and a candidate is nominated by a majority of votes cast, that candidate will be deemed elected to fill the balance of the unexpired term. If the special primary election is held more than 100 days preceding the regular general election and no candidate is nominated by a majority of votes cast, the council shall call for a second special election in which the candidate receiving a majority of votes cast will be deemed elected to fill the balance of the unexpired term. If the special primary election is held more than 100 days preceding the regular general election and a candidate is nominated by a majority of votes cast, that candidate will be deemed elected to fill the balance of the unexpired term.

(3) Was not a candidate for the same office in the regular primary election, then if a candidate nominated by a majority of votes cast in that primary, that candidate will be deemed elected to fill the balance of the unexpired term. If no candidate is nominated by a majority of votes cast, the council shall call for a special election in which the candidate receiving a majority of votes cast will be deemed elected to fill the balance of the unexpired term. Any election required by this subsection, between two nominees who received the highest number of votes cast in a prior election, shall be held not more than 45 days after the prior election.

(e) A person holding an office elective under this charter may file with the auditor a written notice of intent to resign from office on a specific future date or the occurrence of a specific event within the unexpired term of the office. The council then may by resolution schedule and hold the special election or elections, as provided in subsections (b) through (d) of this section, although no vacancy has occurred. However, no candidate elected to fill an unexpired term under this subsection may take and assume the duties of the office unless and until the vacancy occurs.

(f) If a vacancy occurs in the office of auditor, the council may fill the office by appointment pending election as provided for herein.

(g) In the event of the death or crippling disability preventing the performance of duty of three or more members of the city council due to natural disaster, calamity, accident or enemy attack, the following city officials in the order named shall succeed to the vacancies on the city council: city auditor, city attorney, city engineer, city treasurer, chief of the bureau of police, chief of the bureau of fire, assistants to members of the city council in the order of their seniority as assistants. The city council thus constituted shall serve as an interim council for the purpose of transacting necessary city business, and the city officials serving as members of such interim city council shall serve without bond, notwithstanding the provisions of Section 2-203 of this charter and the foregoing provisions relating to qualification. The interim council so constituted shall as soon as practical select from among qualified citizens of the city of Portland, as defined by Section 2-202 of this charter, persons to serve as members of the city council. The persons so selected shall qualify and take an oath of office before entering upon their duties, but such persons shall have 60 days within which to provide bond, notwithstanding the provisions of this charter making filing thereof a prerequisite to qualifying. The person so selected shall serve until the next regular election. The city council as thus constituted shall, if the regularly elected mayor is not a member thereof, elect one of their number as mayor. Members of the council as thus constituted shall serve as city commissioners and shall be assigned to positions and departments by the mayor, and shall have all the powers and duties assigned to the mayor and commissioners by this charter. The council as constituted under authority of this subsection shall meet in the city hall, if possible, but may meet at an alternate location which shall be designated in advance by the council as an alternate site for the transaction of city business. In the event of martial law, the council shall be organized as by this subsection provided, and it shall function to the extent possible under the order establishing martial law. The provisions of this subsection shall be supreme in the event it shall be employed, notwithstanding any other provisions of this charter or ordinances of the city in conflict therewith.

APPENDIX B**Interviewed by the Committee**

Connie McCready, Mayor
Frank Ivancie, City Commissioner
Mildred Schwab, City Commissioner
Charles Jordan, City Commissioner
Mike Lindberg, City Commissioner
A. Leon Beshear, Principal Deputy City Auditor
Richard Braman, Deputy City Attorney

Interviewed Individually

Marge Kafoury, President, Metropolitan Service District Council
Rick Gustafson, Executive Director, Metropolitan Service District
Dennis Buchanan, Chairman, Multnomah County Commission
Earl Blumenauer, Multnomah County Commissioner
Gordon Shadburne, Multnomah County Commissioner
James Maddess, Attorney, League of Oregon Cities
E. Kimbark MacColl, Author
Floyd McKay, Political Commentator
John Salisbury, Political Commentator
Dorothy McCullough Lee, Attorney, Former Mayor
Lloyd Anderson, Executive Director, Port of Portland, Former City Commissioner
Barbara Roberts, Former County Commissioner
Tom McCall, Former Governor, Political Commentator
Olive Larson, Former Executive Director, Portland Chamber of Commerce
Chris Thomas, City Attorney
Greg McMurdo, Assistant Secretary of State
Allen Robertson, Elections Manager, Elections Division, Multnomah County